

JAN 19 1993

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
(OFFICE OF THE SECRETARY)

In the Matter of )  
Implementation of the Cable Television )  
Consumer Protection and Competition )  
Act of 1992 ) MM Docket No. 92-259 /  
Broadcast Signal Carriage Issues )

REPLY COMMENTS OF THE  
UNITED STATES TELEPHONE ASSOCIATION

The United States Telephone Association (USTA) respectfully submits these Reply Comments on issues relating to broadcast signal carriage. These Reply Comments deal with aspects of retransmission consent.

**A. A PURE VIDEO DIALTONE CARRIER IS NOT A MULTICHANNEL VIDEO PROGRAMMING DISTRIBUTOR.**

USTA's Comments addressed the issue of whether a common carrier video dial tone provider would be a multichannel video programming distributor (MCVPD) within the terms of section 2(c)(6) of the 1992 statute. 47 USC § 602(12). The USTA comments concluded that a pure video dialtone provider was not intended to be a MCVPD, and urged the Commission to so find. USTA's comments explained that the Congress did not intend that a broadcaster be compensated twice for the same retransmission. Unless and until a carrier was involved in the direct provision of programming to its own base of video programming customers, the carrier itself should not be viewed as a MCVPD, because the broadcaster would be compensated by the video dialtone provider's

customer, who was engaged in the direct provision of programming over the carrier's video dialtone lines.<sup>1</sup> NYNEX and Bell Atlantic agreed with this conclusion.<sup>2</sup> The Commission itself tentatively accepts that the obligation was not placed on a distribution entity, but is instead on the entity selling its programming package to the retail customer. NPRM at ¶ 42. This should hold for all aspects of the new statute, including retransmission consent.

## **II. MULTICHANNEL VIDEO PROGRAMMING DISTRIBUTORS SHOULD BE TREATED IN AN EVENHANDED MANNER WITH RESPECT TO RETRANSMISSION CONSENT.**

There is an anomaly in the NPRM discussion of retransmission consent, because the Commission's narrative mostly describes the role of retransmission consent as one applicable to cable operators. However, the express and implied terms of the statute

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<sup>1</sup> This is consistent with the view that the Congress intended not to disturb the Commission's holding that neither a common carrier nor its common carrier customer would be a "cable operator" under Title VI of the Communications Act, but it would still assure that when a customer on a video dialtone network provided programming directly to its customers, and that programming included local broadcast stations, the broadcasters' rights would be protected. Telephone Company-Cable Television Cross Ownership, 7 FCC Rcd 5069 (1992), appeals pending.

<sup>2</sup> USTA's analysis must be differentiated from the comments of Time Warner. Time Warner states simply that the MCVPD definition should be broadly construed. Time Warner at 33. USTA agrees that the definition was not intended to be exclusive; however, this does not mean it should be extended beyond the purposes articulated by Congress. The language cited by Time Warner says only that the definition should be construed as broadly as needed for retransmission consent purposes so as to assure broadcasters are compensated for the product value they provide.

itself show that it is broader. See NPRM at ¶¶ 46-47.<sup>3</sup>

Including all MCVPDs would assure that broadcasters would obtain maximum geographic area distribution of their products, thus fulfilling a key objective of the statute. Local broadcasters can receive all "per subscriber" value of their product only if they are entitled to obtain appropriate compensation from all providers of their programming. That includes cable operators and other MCVPDs. In addition, only in this way can the Commission and the Congress be most confident that local over-the-air stations would be made available to all customers of the various MCVPDs.

The goals the Commission sets out are correct - assuring a measure of parity among entities who compete against one another in the same geographic market and at the same level of distribution in providing video programming directly to customers, and also assuring that over-the-air broadcast programming will not be able to be used as a point of leverage to affect, control or influence the viability of retransmission media. NPRM at ¶¶ 4, 42. Those goals can be best achieved by the framework articulated by USTA.

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<sup>3</sup> It is understandable that the Commission's discussion mostly uses the term "cable systems." Section 325(b) applies only in the case of aural broadcast signal distribution, where the definition of a cable system is not involved. Where the 1992 statute uses the MCVPD term, it also covers those who use a pure video dialtone network. The comments of the Wireless Cable Association (WCA) show that section 325(b) covers both cable systems and other MCVPD networks. CA at p. 3.

Other commenters agree that the retransmission consent provision covers MCVPDs. See TCI at 32. USTA concurs on the assumptions stated in the NPRM - that distributors (including pure video dialtone providers) themselves are not MCVPDs, and, equally significant, that a broadcaster's retransmission consent election will apply equally to all competitors in a geographic area. NPRM at ¶ 45. The Commission notes that a station must make the same election for all competitors in the same geographic area. NPRM at ¶ 45 and note 60. Thus, confirming a Commission policy of equal treatment should not pose a problem in a final order. Assuring that there will be no leverage is somewhat more difficult.

There are commenters who are directly concerned about obtaining parity with established cable operators. The Consortium of Concerned Wireless Cable Operators (CCWCO) and the CA each express such a concern. CCWCO seeks access on nondiscriminatory terms and conditions to television broadcast stations who elect retransmission consent, and asks the Commission to prohibit exclusive, unfair and discriminatory retransmission arrangements. CCWCO at 3-4. CA asks the Commission to prohibit any exclusive retransmission consent agreements. CA at 24. CA believes that cable operators retain both the incentive and opportunity to extract exclusivity or discriminatory provisions from local broadcasters to the detriment of others. CA at 5. The findings of Congress in

enacting the statute confirm the continuing monopoly power of cable interests, so this is not a spurious concern.

The Copyright Office concurs with the Commission's reading of the new provisions of the statute to require equal treatment of MCVPDs in retransmission consent arrangements. In its comments, the Register of Copyrights concludes that the election by a station of retransmission consent or of must-carry status applies to all systems within a single geographic area, measured for Commission purposes by Arbitron's Area of Dominant Influence (ADI). Register of Copyrights at 8. The Commission's analysis and the Copyright Office analysis correctly conclude that retransmission consent should be an "everyone or no one" election by a local broadcast station.

A corollary of this conclusion is that the significant terms of a station's retransmission consent agreement in the same geographic area and at the same level of distribution should contain no term or condition that might affect competition there. Most important, a local broadcaster that negotiates compensation for its product should enter into negotiations with an assumption that the core terms and conditions should be equally available to other MCVPDs in the area. The key component would be price per subscriber, as the value of the station should be viewed as being the same across the viewer community. This is consistent with the underlying policy of the statute and the NPRM discussion of

it. NPRM at ¶¶ 45-47. It also is consistent with other key policies and provisions of the statute.<sup>4</sup> Certainly, there are provisions that will not be able to be equal. Marketing support aimed at different subscriber bases may have justifiable differences. However, absent a clear justification, agreement terms and conditions should be comparable so as to maintain the policy against improper leverage.

MCVPDs who redistribute local broadcast channels on a video dialtone network should be able to do so on terms and conditions that are no more burdensome than are applicable to separate cable systems in the same geographic area. Thus, USTA generally agrees that the Commission also should conclude that such agreements should not be allowed to operate indirectly to affect competition among cable operators and other MCVPDs. That is consistent with the Commission's own tentative views. NPRM at ¶ 4.

### **III. THE COMMISSION SHOULD PROVIDE A FORUM FOR EXPEDITIOUS DISPUTE RESOLUTION.**

USTA disagrees with one related suggestion in the NPRM. The Commission indicates that disputes should be left to the courts. NPRM at ¶ 57. That will encourage evasion of the policy of the statute. The Commission should provide an alternative forum for addressing disputes. Court backlogs could perpetuate for many

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<sup>4</sup> One clearly related provision is the provision favoring access to programming being implemented separately in MM Docket No. 92-265.

years a competitive imbalance that is initiated with discriminatory agreements. Further, courts are likely to refer these matters to the Commission under the doctrine of primary jurisdiction, introducing yet additional delay in the resolution of disputes.<sup>5</sup>

#### IV. CONCLUSION.

For the reasons set forth above and in USTA's comments, the Commission's retransmission consent rules should exclude pure carrier-provided video dialtone services (and channel services) from any retransmission consent requirements, to avoid double payment to television broadcasters. It should require that retransmission consent by each broadcaster in a given market be granted on terms that do not discriminate among competing MCVPDs. Finally, it should provide a primary and expeditious forum for resolution of disputes with regard to retransmission consent.

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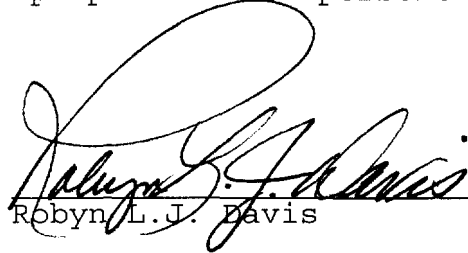
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<sup>5</sup> Cf. Lowest Unit Charge Requirements, 6 FCC Rcd 7511 (1991); recon. denied, 7 FCC Rcd 4123 (1992).

**CERTIFICATE OF SERVICE**

I, Robyn L.J. Davis, do certify that on January 19, 1993  
copies of the foregoing Reply Comments of the United States  
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the U.S. Mail, first-class, postage prepaid to the persons on the  
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